

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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REBECCA SPEIGLE and MILES SPEIGLE,

Plaintiffs,

v.

FIRST NATIONAL BANK OF NEVADA;  
et al.,

Defendants.

3:11-CV-0335-LRH-VPC

ORDER

Before the court is defendant MTC Financial Inc.'s ("MTC") (erroneously sued as Trustee Corps) motion to dismiss. Doc. #16.<sup>1</sup> Plaintiffs Rebecca Speigle and Miles Speigle (collectively "the Speigles") filed an opposition (Doc. #18) to which MTC replied (Doc. #26).

Also before the court is previously dismissed defendants Security Union Title Insurance Company and Susan Dana's motion for attorney's fees. Doc. #23. The Speigles filed an opposition (Doc. #32) to which moving defendants replied (Doc. #33).

**I. Facts and Procedural History**

In 2006, the Speigles purchased real property through a mortgage note and deed of trust executed by defendant First National Bank of Nevada ("First National"). The Speigles defaulted on the loan and defendants initiated non-judicial foreclosure proceedings.

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<sup>1</sup> Refers to the court's docketing number.

1 Subsequently, the Speigles filed a complaint against defendants alleging nine causes of  
2 action: (1) debt collection violations; (2) Nevada Unfair and Deceptive Trade Practices Act, NRS  
3 598.0923; (3) Nevada Unfair Lending Practices Act, NRS 598D.100; (4) breach of the covenant of  
4 good faith and fair dealing; (5) NRS 107.080; (6) quiet title; (7) fraud; (8) slander of title; and  
5 (9) abuse of process. Doc. #1, Exhibit A. Thereafter, MTC filed the present motion to dismiss.  
6 Doc. #16.

## 7 **II. Legal Standard**

8 MTC seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to  
9 state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state a  
10 claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading  
11 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That  
12 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is  
13 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require  
14 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a  
15 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.  
16 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

17 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,  
18 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting  
19 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows  
20 the court to draw the reasonable inference, based on the court’s judicial experience and common  
21 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility  
22 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a  
23 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a  
24 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to  
25 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

1 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as  
 2 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of  
 3 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*  
 4 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)  
 5 (internal quotation marks omitted). The court discounts these allegations because “they do nothing  
 6 more than state a legal conclusion—even if that conclusion is cast in the form of a factual  
 7 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to  
 8 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be  
 9 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

### 10 **III. Discussion**

#### 11 **A. Debt Collection Violations**

12 Pursuant to NRS § 649, it is a violation of state law to violate any provision of the federal  
 13 Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 et seq. NRS § 649.370. Here,  
 14 the Speigles allege that defendants violated the FDCPA by initiating a non-judicial foreclosure  
 15 without following the proper procedures for attempting to collect a debt.

16 It is well established that non-judicial foreclosures are not an attempt to collect a debt under  
 17 the Fair Debt Collection Practice Act and similar state statutes. *See e.g., Hulse v. Ocwen Fed. Bank*  
 18 *FSB*, 195 F. Supp. 2d 1188 (D. Or. 2002); *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D. Nev.  
 19 2010) (holding that recording a notice of default is not an attempt to collect a debt because the  
 20 borrower already consented to allow the foreclosure trustee to record the notice upon default).  
 21 Therefore, the court finds that the Speigles fail to state a claim against moving defendants for  
 22 violation of the FDCPA, and thereby NRS § 649.

#### 23 **B. Nevada Unfair and Deceptive Trade Practices Act**

24 Pursuant to NRS 598.0923 it is a deceptive trade practice to conduct business in the State of  
 25 Nevada without all required state, county or city licenses. NRS 598.0923(1). The Speigles allege  
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1 that defendants violated the statute by recording the underlying notice of default without having a  
2 state business license. However, it is undisputed that defendant MTC took no action in recording  
3 the notice of default. Because MTC took no action in causing the notice of default to be recorded, it  
4 cannot have violated the Nevada Unfair and Deceptive Trade Practices Act as a matter of law.

### 5 **C. Nevada Unfair Lending Practices Act**

6 NRS 598D.100 prohibits lenders from making loans “without determining, using  
7 commercially reasonable means or mechanisms, that the borrower has the ability to repay the home  
8 loan.” NRS 598D.100(1)(b). However, this suitability language was added in mid-2007 when the  
9 statute was amended. Although the Speigles allege that defendants violated the present version of  
10 the statute, their loan originated in early 2006, prior to the current amendment. Therefore, the  
11 Speigles’ loan cannot have violated the current statutory language requiring a determination that a  
12 borrower has the ability to repay the loan.

13 Additionally, the Speigles’ unfair lending practices claim is barred by the applicable statute  
14 of limitations. The statute of limitations on an unfair lending practices claim under NRS 598D is  
15 two (2) years. *See* NRS § 11.190(3)(a). The Speigles purchased the property in 2006, and did not  
16 file the present action until 2011, over three years after the statute of limitations had expired.  
17 Accordingly, the court shall grant moving defendants’ motions as to this issue.

### 18 **D. Breach of Good Faith and Fair Dealing**

19 Under Nevada law, “[e]very contract imposes upon each party a duty of good faith  
20 and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe County*, 784  
21 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for  
22 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the  
23 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and  
24 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner  
25 unfaithful to the purpose of the contract; and (4) the plaintiff’s justified expectations were denied.

1 *See Perry v. Jordan*, 134 P.3d 698, 702 (Nev. 2006) (citing *Hilton Hotels Corp. v. Butch Lewis*  
2 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

3 The court notes that there is no contract between the Speigles and defendant MTC. The only  
4 contract at issue is the mortgage note originated by non-moving defendant First National.  
5 Therefore, the court finds that the Speigles have failed to allege a sustainable claim for breach of  
6 the covenants of good faith and fair dealing as to this defendant.

7 **E. NRS 107.080**

8 In their complaint, the Speigles allege that defendants improperly foreclosed on their  
9 property because the promissory note was severed from the deed of trust and none of the defendants  
10 hold the original mortgage note. *See* Doc. #1, Exhibit A.

11 Nevada law does not require the production of the original note before one of the statutorily  
12 enumerated parties initiates a non-judicial foreclosure. *Weingarter v. Chase Home Finance, LLC*,  
13 702 F. Supp. 2d 1276, 1280 (D. Nev. 2010). Therefore, the Speigles fail to allege a claim upon  
14 which relief can be granted.

15 **F. Quiet Title**

16 Under Nevada law, a quiet title action may be brought by someone who claims an adverse  
17 interest in property. NRS § 40.010. Here, defendant MTC does not claim any interest in the  
18 property adverse to the Speigles' interest in the property. Therefore, the Speigles have no grounds  
19 to quiet title.

20 **G. Fraud**

21 "In alleging fraud or mistake, a party must state with particularity the circumstances  
22 constituting fraud or mistake." FED. R. CIV. P. 9(b). In order to meet the heightened pleading  
23 requirements a plaintiff must specify the time, place, and content of the misrepresentation as well  
24 as the names of the parties involved. *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th  
25 Cir. 1999); *see also, Parnes v. Gateway 2000*, 122 F.3d 539, 549-50 (8th Cir. 1997) (requiring a  
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1 plaintiff to allege the requisite who, what, where, when, and how of the misrepresentation).

2 Here, the Speigles fail to allege anything more than defendants defrauded them during the  
3 loan process. There are no allegations of who failed to provide information or what information  
4 was not provided. Further, the Speigles fail to specifically allege the requisite “time, place, and  
5 specific content of the false representation as well as the identities of the parties to the  
6 misrepresentations.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). Therefore,  
7 the court finds that the Speigles’ allegations are insufficient to support their claim for fraud.

#### 8 **H. Slander of Title**

9 A claim for slander of title “involves false and malicious communications, disparaging to  
10 one’s title in land, and causing special damages.” *Executive Mgmt., Ltd. v. Ticor Title Co.*, 963 P.2d  
11 465, 478 (Nev. 1998).

12 Here, the recorded notice of default and notice of trustee’s sale are not false and malicious  
13 communications disparaging the Speigles’ title. First, the Speigles concede that they were in default  
14 on their loan. Thus the notice of default does not make a false statement about his title to the  
15 property. Second, it is not false that the property was to be sold at a trustee’s sale. Therefore, the  
16 court finds the Speigles have failed to state a claim for slander of title.

#### 17 **I. Abuse of Process**

18 To establish a claim for abuse of process a party must show that an opposing party (1) had  
19 an ulterior purpose for bringing a legal action other than resolving a legal dispute, and (2) used the  
20 legal process in a way that is not proper in the regular conduct of the proceeding. *Las Vegas Fetish*  
21 *and Fantasy Halloween Ball, Inc. v. Ahern Rentals*, 182 P.3d 764, 767 (Nev. 2008); *Georgiou*  
22 *Studio, Inc. v. Boulevard Invest, LLC*, 663 F. Supp. 2d 973, 982 (D. Nev. 2009).

23 Here, the court finds that the Speigles have failed to allege any facts demonstrating that  
24 defendants had an ulterior motive in initiating non-judicial foreclosure proceedings other than the  
25 resolution of their default on the mortgage note. Further, the process at issue in this action is a non-  
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1 judicial foreclosure which is not the characteristic legal action contemplated by an abuse of process  
2 claim. *See e.g., Smith v. Wachovia Mortgage Corp.*, 2009 WL 1948829, \*5 (N.D. Cal. 2009).

3 Therefore, the court finds that the Speigles have failed to state a claim for abuse of process.

4 Accordingly, the court shall grant moving defendant's motion to dismiss.<sup>2</sup>

5 **J. Attorney's Fees**

6 A district court has wide discretion to grant attorney's fees. *Moore v. Permanent Medical*  
7 *Group*, 981 F.2d 443, 446 (9th Cir. 1992). Here, the court declines to exercise its discretion in  
8 awarding attorney's fees because the Speigle's complaint was not vexatious litigation or brought in  
9 bad faith. Therefore, the court shall deny moving defendants' request for attorney's fees.

10  
11 IT IS THEREFORE ORDERED that defendant's motion to dismiss (Doc. #16) is  
12 GRANTED. Defendant MTC Financial Inc., erroneously sued as Trustee Corps., is DISMISSED as  
13 a defendant in this action.

14 IT IS FURTHER ORDERED that defendants' motion for attorney's fees (Doc. #23) is  
15 DENIED.

16 IT IS SO ORDERED.

17 DATED this 21st day of February, 2012.



20  
21 LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE

22  
23  
24 <sup>2</sup> The court, in granting defendant's motion to dismiss, notes that the Speigles did not request leave to  
25 amend their complaint. However, even if they did request leave to amend, the court would deny the request  
26 because they have failed to make any showing that amendment in this particular case would not be futile or that  
they could overcome the identified pleading defects.